

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORLAND DIVISION

5 DANIEL WALKER, individually)
and on behalf of all others)
6 similarly situated,)
)
7 Plaintiff,) No. 3:17-cv-01791-YY
)
8 v.) February 27, 2018
)
9 FRED MEYER, INC., a Delaware) Portland, Oregon
corporation,)
10)
Defendant.)

TRANSCRIPT OF PROCEEDINGS

(Telephonic Oral Argument)

BEFORE THE HONORABLE YOULEE YIM YU

UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

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1 (February 27, 2018; 9:32 a.m.)

2
3 P R O C E E D I N G S

4
5 THE COURT: Good morning. This is Judge You. We're
6 on the record. This is case No. 17-cv-1791. The name of the
7 case is Walker v. Fred Meyer.

8 Counsel, please state your appearances for the record
9 starting with plaintiff's counsel.

10 MR. WOODROW: Good morning, Judge. Steven Woodrow for
11 the plaintiff.

12 MR. WEINGART: And good morning, Your Honor. This is
13 Neal Weingart, also for the plaintiff.

14 THE COURT: All right. How about counsel for the
15 defense?

16 MS. WHITTAKER: Good morning, Your Honor. This is
17 Faith Whittaker for the defendant.

18 MR. MATTINGLY: Your Honor, this is Mike Mattingly,
19 also for the defendant.

20 MR. RICHMAN: Good morning, Your Honor. This is
21 Taylor Richman, global counsel for the defendant.

22 THE COURT: Okay. Good morning again.

23 Let me remind you that we are on the record. We have
24 a court reporter who is also on the line, so just remember that
25 she is always present and making her very best attempt to

1 provide an accurate transcript of the proceedings. So please
2 speak slowly and clearly, and if you can, try to remember to
3 identify yourself before speaking.

4 We are here on the defendant's motion to dismiss for
5 failure to state a claim and also for lack of jurisdiction. I
6 have the motion. I received the motion as well as the exhibits,
7 also the response in addition to other exhibits and the reply.

8 Let's start with the question with respect to the
9 standalone disclosures.

10 And what I'm going to do is, of course, preface my
11 questions with the statement that you all know this case far
12 better than I do, and what I'm hoping is that you can help to
13 explain some things and fill in some gaps for me.

14 Now, the complaint in this case, as you know, says
15 that this was an online application. And I'm just pulling up
16 the complaint here because I want to refer to a section of it.

17 I'm referring to paragraph 13 which says that
18 Mr. Walker applied for a job with Fred Meyer using Fred Meyer's
19 online application process. And then No. 15 says, "Upon
20 beginning employment, plaintiff was required to complete various
21 acknowledgements of company disclosures including a series of
22 disclosures regarding his background and criminal history."

23 And then paragraph 17 refers to some other
24 documents -- actually, let's move to paragraph 18.

25 And so I guess what's unclear to me, and perhaps

1 you've explained it in your pleadings and I've just missed it,
2 but can I ask, the disclosure at issue, which is Exhibit C, when
3 was that provided to Mr. Walker and in what context?

4 I guess -- and because this is a motion to dismiss
5 based on the complaint, where can I ascertain that information
6 in the complaint?

7 Let me start with plaintiff's counsel.

8 MR. WOODROW: Yes, Judge.

9 While we need discovery to clear up some of these
10 factual issues, it's plaintiff's understanding that there was an
11 online application process. Then Mr. Walker had to --

12 THE CLERK: Excuse me, Your Honor. Your Honor?

13 THE COURT: Yes.

14 THE CLERK: The court reporter needs to know who is
15 speaking, please.

16 MR. WOODROW: My apologies. It's Steven Woodrow,
17 Your Honor, for the plaintiff.

18 THE CLERK: Thank you.

19 MR. WOODROW: It's our understanding, Judge, and we
20 would need confirmatory discovery on it, that Mr. Walker applied
21 using the online application process, was then called in to Fred
22 Meyer where he in person was presented with documents, and that
23 these disclosures referenced in these paragraphs are those
24 disclosures that were provided in -- not in the online
25 application but in that in-person session or sessions.

1 THE COURT: And I think that what you're saying
2 arguably could be inferred from the facts as they're alleged in
3 the complaint, but I just wanted to clarify. I just wanted to
4 make an attempt to clarify that.

5 Additionally, the disclosure appears to have been
6 signed -- there actually appears to be a physical signature
7 rather than a digital signature. Again, referring to Exhibit C.

8 But -- so I just wanted to clarify because I did see
9 one case -- I can't remember which case it was, but in doing
10 some research on this I saw one case in which I think that there
11 were online disclosures and there was a question as to whether
12 or not the -- whether or not they were separate documents or all
13 the same.

14 Nevertheless, anything that the defense would like to
15 say in that regard?

16 MR. MATTINGLY: Your Honor, this is Mike Mattingly.

17 We would agree that the Exhibit C to our motion, which
18 was executed by Mr. Walker on 3/21/17, was executed at the store
19 during his in-person interview, and that date coincides with
20 the -- his interview at the store.

21 THE COURT: Okay. Great. Thanks so much for the
22 clarification.

23 All right. So then moving to the substance of the
24 issues, I would like plaintiff to explain, looking at Exhibit C,
25 is it your argument that the last three paragraphs of that

1 document, that that is where, for lack of a better way to put
2 it, the line is crossed in terms of the requirements of
3 1681b(B) (2) (A) (i)?

4 MR. WOODROW: Yes, Judge.

5 I think we take a more wholistic approach than just
6 limiting it to the last three paragraphs. I think when it's
7 read with the acknowledgment of receipt and the authorization
8 that followed it, it's pretty clear that the disclosure is
9 riddled with extraneous information. It combines investigative
10 consumer reports with ordinary consumer reports. It distracts
11 from the consumer report disclosures. It contains information
12 about interviews and bringing folks to accompany you when you go
13 view information and other extraneous info.

14 It doesn't contain the one thing that the statute
15 authorizes, and that's an authorization which says I allow for
16 the obtaining of a consumer report. And what the defendant does
17 here is they provide a separate authorization page, but that's
18 riddled with extraneous information too.

19 And so when you read these two documents together,
20 Your Honor, it's pretty clear that they don't stand alone. We
21 would allege that if the purpose of the standalone disclosure
22 requirement and the allowance for an authorization in one
23 document so the applicants know what they're authorizing,
24 separate -- separating them but loading up the authorization
25 with extra information when the disclosure itself combines

1 investigative consumer report information with ordinary
2 information, it defeats the purpose of the statute, and we
3 allege specifically in paragraph 20 that Mr. Walker was confused
4 and that ordinary consumers would be similarly confused.

5 And it's not clear whether the person is authorizing
6 an investigative consumer report, a consumer report, they're
7 just acknowledging receipt of this document, or what. That's
8 the problem.

9 THE COURT: Let me ask you this. So in looking at
10 subsection (2) (A), in subsection (i) it says that this
11 standalone document has to be provided, and then it separately
12 says in subsection (2) that the consumer has to authorize in
13 writing.

14 Is there anything in this statute that requires the
15 disclosure and the authorization -- or is there any other
16 authority that requires the disclosure and the authorization to
17 be in the same document?

18 MR. WOODROW: No, Judge. The disclosure and the
19 authorization do not have to be in the same document.

20 What the authorities say, and what they instruct, is
21 that the only thing that the standalone disclosure can contain,
22 and without extra -- the only extra information it can contain
23 without it losing its standalone disclosure status is the
24 authorization because the authorization is simply supposed to
25 authorize the obtaining of a consumer report. It's not supposed

1 to give carte blanche authority to a consumer reporting agency
2 blessing whatever methods that consumer reporting agency has
3 decided to use to gather the information.

4 And that's the problem with the authorization here.
5 To read this authorization as a proper one simply because it's
6 in writing when it is loaded up with allowing GIS to, you know,
7 gather information from any public or private information
8 source, when you have that, it defeats the intent of the statute
9 which is to let people know clearly and conspicuously that they
10 are authorizing the obtaining of a consumer report, nothing
11 else.

12 THE COURT: Let me ask you this. Let me ask you this.

13 So subsection (2), the authorization, there's no
14 requirement that the authorization be in a standalone setting;
15 correct?

16 MR. WOODROW: Correct. It can be included with the
17 disclosure.

18 THE COURT: Well, let me ask you this. So
19 hypothetically if I concluded that there were portions of the
20 disclosure, Exhibit C, that were -- that did not comply with
21 subsection (i), so for example if I looked at Exhibit C and
22 there -- these last two paragraphs, if I found that, including
23 those last two paragraphs, didn't comply with subsection
24 (i) -- are you following me so far?

25 MR. WOODROW: Yes.

1 THE COURT: -- then what does it matter what is
2 contained in -- what does it matter what additional information
3 is contained in Exhibit D --

4 MR. WOODROW: Technically, Your Honor --

5 THE COURT: -- other than the authorization?

6 MR. WOODROW: Yes, Judge. I understand the question,
7 the Court's question.

8 And in that case it wouldn't -- it wouldn't change the
9 fact that there's a violation; it just simply compounds to the
10 confusion. And that's what those allegations add. It adds
11 color to the complaint that not only does the quote/unquote
12 standalone disclosure not stand alone, but the authorization is
13 also confusing, and that when you look at these documents that
14 the -- that these applicants and employees are being provided,
15 it does not comport with the statute's requirement that they be
16 clearly and conspicuously notified that they are going to have a
17 consumer report obtained about them.

18 If the Court were to find that the bottom half of
19 Exhibit C is plausible -- counts it as a plausible violation of
20 the FCRA, then that's what this case is going to be about.

21 THE COURT: The reason I'm asking is because
22 subsection (2) does not contain that clear and conspicuous
23 language or any standalone language, and here we have an
24 authorization in Exhibit D -- and I understand what you're -- I
25 understand your argument that it's altogether confusing, but I'm

1 parsing it down more specifically than that.

2 So in any event, let me ask you another question.

3 So we've talked about the last two paragraphs, or I
4 mentioned the last two paragraphs. I want you to look at the
5 third paragraph and explain to me why the third paragraph is
6 really any different than the last sentence of the first
7 paragraph.

8 MR. WOODROW: You're talking about the paragraph "To
9 prepare the reports GIS may investigate"?

10 THE COURT: Yes. And so in looking at that, it seems
11 to me that that paragraph essentially reiterates what was
12 perhaps more generally stated in the last sentence of the first
13 paragraph. So what's the harm in adding the third paragraph?

14 MR. WOODROW: Certainly, Judge.

15 The information contained in the third paragraph
16 actually expands upon the scope of the first paragraph. The
17 third paragraph references information that some of it can be
18 included in a consumer report, but some of it's also stuff that
19 you can get in investigative consumer reports like, you know,
20 references, et cetera.

21 And so it's confusing to the consumer whether this
22 paragraph is supposed to be a mundane disclosure that's allowed
23 and permitted with respect to ordinary consumer reports, or is
24 it actually touching upon the nature and scope of the
25 investigation to be performed as part of an investigative

1 consumer report.

2 THE COURT: I understand.

3 MR. WOODROW: That's why -- I'm sorry, Judge. But
4 this is why the statute requires separate disclosures.

5 THE COURT: Okay. I understand. Thank you.

6 All right. So let me ask the defense if you would
7 like to comment or respond to anything that plaintiff's counsel
8 has said with respect to the questions that I've asked.

9 MR. MATTINGLY: Absolutely, Your Honor. This is Mike
10 Mattingly.

11 Your Honor, first and foremost, with respect to
12 the -- and we addressed this in our reply -- the complaint
13 doesn't contain an allegation, a violation of
14 1681b(B) (2) (A) (ii). That simply is not a cause of action. So I
15 don't know why we're addressing it specifically.

16 But to the extent that it is considered to be part of
17 another claim, we would agree that there is no requirement in
18 the statute which requires the authorization to be a standalone
19 clear and conspicuous document. So regardless of what
20 information is in there, one, there's no claim; and, two, it's
21 irrelevant.

22 With respect to the combination of consumer report
23 information or disclosures under 1681b(B) (2) (A) (i) and a
24 combination of investigative consumer report information as
25 authorized by 1681g, there is no problem with the combination.

1 In fact -- and the FTC opinion letter, *Willner*, that is cited in
2 the opposition by the plaintiff, specifically states that those
3 disclosures can be combined so long as the investigative
4 consumer report disclosure does not overshadow.

5 And so that's based on -- now we would have a further
6 discussion about the persuasiveness of *Willner* in light of the
7 *Syed* ruling in 2017.

8 But there's absolutely no problem with a limited
9 disclosure such as we have here in Exhibit C which tells the
10 consumer the basic parameters within which it either may obtain
11 a consumer report or investigative consumer report. There's
12 nothing inappropriate in that. Under statute, those are
13 authorized. And there's no extraneous information, as a matter
14 of law.

15 THE COURT: Okay. All right. So then let me ask just
16 generally if there's anything that you would like to argue with
17 respect to the standalone disclosure issue.

18 And I'll start with the defendant because it's your
19 motion. Anything else that you would like to highlight?

20 And don't feel that you need to rehash all of the
21 arguments that you've made in your briefing, but I just wanted
22 to give you the opportunity, if you wanted, to highlight
23 anything with respect to this particular claim.

24 MR. MATTINGLY: Yes, Your Honor. And this is Mike
25 Mattingly again. And I'll keep it brief because I think our

1 written positions outline standards -- the appropriate
2 standards.

3 So I just would like to say that, Your Honor, we
4 believe the form speaks for itself on its face. The -- it only
5 includes -- the information that it included is -- as a matter
6 of law, is not extraneous. It only references process for
7 obtaining consumer reports or potentially investigative consumer
8 reports as authorized by the law. It does not include any sort
9 of the extraneous information that other district courts have
10 found to be impermissible such as the cases cited in the
11 opposition by the plaintiff that included extraneous state law
12 notices, statements of internal policy, EEO preferences, or even
13 liability waivers.

14 So none of that stuff is included here, Your Honor.
15 And rather, we would just point out that each and every
16 statement either informs the consumer, or in this case,
17 Mr. Walker, about Fred Meyer's FCRA process, the information
18 that would be obtained, describes the permissible purpose under
19 the statute for which we obtain the report, and most
20 importantly, some of his legal rights. So with respect to that,
21 we would say the form speaks for itself.

22 The only other thing I would say, Your Honor, is with
23 respect to -- Mr. Walker has made the strategic decision to seek
24 statutory damages on behalf of a national class rather than
25 actual damages. So with that comes a heightened burden that he

1 has to prove willfulness using a recklessness standard and which
2 is a higher standard, obviously, than negligence.

3 And the only other thing I would point out is that the
4 *Syed* case recently, the Ninth Circuit relying on the Supreme
5 Court has said that where an employer adopts a reading of the
6 statute runs a risk of error substantially greater than the risk
7 associated with a reading that was merely careless, that is
8 where a willful violation could occur.

9 The *Syed* court also acknowledged that it's possible to
10 imagine interpretations of 1681b(B) (2) (A) that would be
11 objectively unreasonable without rising to the level of
12 recklessness.

13 Clearly, Your Honor, it's Fred Meyer's position that
14 nothing in this disclosure is unreasonable. But even if this
15 Court determines that anything was extraneous information and
16 was objectively unreasonable based on existing case law or the
17 statute, it clearly does not rise to the level of recklessness
18 given that each and every statement just seeks to inform the
19 consumer of their rights under the FCRA and describe the process
20 that would be undertaken so that they could sign a separate
21 acknowledgment that was knowing and voluntary.

22 So with that, Your Honor, that's what we take off
23 that.

24 THE COURT: All right. Thank you.

25 And so let me move back, then, to Mr. Woodrow.

1 Anything that you would like to highlight or respond
2 to?

3 MR. WOODROW: Yes. Thank you, Judge. Steven Woodrow
4 very quickly.

5 Judge, Fred Meyer takes the allegations of the
6 complaint in the light most favorable to themselves. We
7 expressly allege that the consumer report combined with the
8 investigative consumer report was confusing to the plaintiff and
9 to others. Whether that can be true turns into a fact issue and
10 this Court should decline the invitation to decide as a matter
11 of law that all the extraneous information in this disclosure
12 isn't quote/unquote extraneous enough as a matter of law to
13 defeat the standalone disclosure requirement.

14 Similarly, Judge, willfulness is a fact issue.
15 Federal Rule 9 allows plaintiffs to plead knowledge generally
16 and intent generally. I think Fred Meyer is asking for a
17 pleading burden that the federal rules simply don't require in
18 this situation.

19 The finder of fact will decide based on the evidence
20 of record whether or not Fred Meyer's combination and inclusion
21 of extraneous information was willful. It's not something that
22 should be done on the pleadings, Your Honor.

23 With that, Judge, I think you have our arguments.

24 THE COURT: Okay. Thank you.

25 So let's then move on to the second claim with respect

1 to the pre-adverse action notice, and I'd like to start with the
2 plaintiff.

3 Can you explain to me your position as to where the
4 statute allows for the type of relief that you're seeking?

5 MR. WOODROW: Certainly, Judge.

6 The statute requires employers to provide a
7 pre-adverse action notice, and it delegates to the FTC authority
8 to show opinions and guidance and to interpret what the statute
9 means on a limited basis. And while the advisory opinions
10 aren't binding, they are persuasive, and for nearly 20 years,
11 Judge, they've held that employers have a burden to provide a
12 pre-adverse action notice with the purpose being that the
13 applicant or employee has a reasonable period of time to then
14 discuss any items in the report with the employer, with the
15 prospective employer. Otherwise, there's no point to having the
16 pre-adverse action notice requirement at all. It's just a
17 perfunctory piece of paper that the employee or applicant is
18 supposed to get.

19 The FTC has held repeatedly that it's not supposed to
20 be just some perfunctory piece of paper. It actually serves a
21 purpose under the statute, to allow employees or applicants not
22 only to dispute inaccurate information, but to explain
23 potentially accurate entries that might not tell the full story.
24 Right?

25 THE COURT: Can I stop -- Counsel, can I stop you

1 right there for just a moment.

2 We have a little bit of -- there's a little bit of
3 difficulty in hearing you, and I just want to make sure that
4 everyone is off a speakerphone because I'm hearing a little bit
5 of an odd crackling sound and I want to make sure the court
6 reporter can take everything down correctly.

7 So I'm sorry to interrupt you, Mr. Woodrow. Could you
8 continue, please.

9 MR. WOODROW: Certainly, Judge.

10 Can the court reporter let me know where I left off?

11 THE COURT REPORTER: -- to allow employees or
12 applicants not only to dispute inaccurate information, but to
13 explain potentially accurate entries that might not tell the
14 full story.

15 MR. WOODROW: Right, Judge.

16 So the purpose of the pre-adverse action notice
17 requirement is to afford applicants and employees this time
18 period. That's what the FTC has said for 19 years and counting,
19 Your Honor.

20 It is not express -- expressly in the statute. That's
21 why the FTC has suggested that employers provide a reasonable
22 period of time, and the most common period of time cited is five
23 business days.

24 Here it looks like GIS was trying to follow that
25 guidance, but it didn't provide people five business days -- it

1 actually sent its final adverse action notice on the fifth
2 business day -- and it doesn't allow or inform the applicant or
3 employer that they can discuss these matters with the employer.
4 It just directs any disputes regarding inaccurate information to
5 GIS.

6 And also, GIS then informs the applicant or employee
7 in the final notice that the applicant and employee has been
8 previously informed of their right to take up any inaccuracies
9 with courts cited in the consumer report.

10 So what we have here, Judge, is, you know, a basic
11 failure to follow the FTC guidance. The FTC guidance should be
12 considered highly persuasive, otherwise the entire purpose of
13 the pre-adverse action portion of the statute is rendered a
14 nullity.

15 THE COURT: Okay. I think I understand.

16 Let me ask Mr. Mattingly, any thoughts on that?

17 MR. MATTINGLY: Yes, Your Honor.

18 To the extent FTC guidance is highly persuasive, as
19 plaintiff's counsel just said, it has been in place for
20 19 years, there are a -- there are numerous FTC decisions that
21 say the -- there are two avenues by which a -- someone of -- an
22 employer can obtain a consumer report and then meet any sort of
23 burden, assuming there is one, to discuss accurate yet negative
24 information such as Mr. Walker's accurate yet negative
25 information in this case. One of those would clearly be to have

1 a direct discussion as suggested by the plaintiff in this case;
2 however, that is not the only opportunity to do that.

3 The FTC opinions include a discussion or allowing the
4 consumer to otherwise respond. Fred Meyer has contracted with
5 GIS to provide adverse action notices, to provide a dispute
6 process, to send out forms to inform the consumers that they can
7 dispute or discuss any accurate -- inaccurate information and as
8 well as adverse action notices.

9 Now, Your Honor, this is important in light of the
10 congressional intent. I am not aware -- and I don't know -- I'm
11 not aware of any case from *Spokeo* to the Ninth Circuit to this
12 very Court that has ever addressed congressional intent
13 being -- existing so that accurate information can be discussed.

14 In fact, you know, *Spokeo* said that Congress plainly
15 sought to curb dissemination of false information by adopting
16 procedures designed to decrease risk. Syed said that Congress
17 recognizes a significant amount of inaccurate information that's
18 being reported by consumer reporting agencies and the
19 difficulties that consumers face getting such errors corrected,
20 and this --

21 THE COURT: Mr. Mattingly, can you just slow down a
22 tad, please.

23 MR. MATTINGLY: Oh, I'm sorry. I apologize,
24 Your Honor.

25 And I was going to say and this Court even said

1 Congress intended to ensure that a potential employee would have
2 the opportunity to address any inaccurately -- or excuse
3 me -- inaccuracies contained in a consumer report.

4 So if there is a case out there that says the
5 congressional intent was to allow the consumer to discuss
6 accurate information, I am unaware of what that is.

7 With respect to that, given that Mr. Walker's
8 claim -- he doesn't claim that any of the information in the
9 consumer report was inaccurate, he just claims that Fred Meyer
10 should have discussed his accurate information with him
11 directly, we don't think that states a claim.

12 Building on the congressional intent that does exist
13 in the case law, Your Honor, we believe that a practical -- it's
14 a practical reality that GIS is exactly who is entitled to
15 administer the dispute process. Fred Meyer contracts with them.
16 GIS is the one who -- they compile the report. They have the
17 ability to double check the report, to make sure it's accurate.

18 So in light of the fact that Congress wanted to
19 correct inaccurate -- identify inaccurate information and give
20 consumers the opportunity to rectify that inaccurate
21 information, Fred Meyer can't do that, GIS can. So asking them
22 to go through the process is completely in keeping with the
23 congressional intent, with the case law, and with FTC opinions
24 that are out there.

25 Now, I would say -- the caveat to that, that is not

1 the same thing as Fred Meyer giving away decisionmaking
2 authority and to review the findings of GIS, the entity that can
3 make those changes.

4 THE COURT: So you're saying that notwithstanding this
5 information or this language in subsection (3) (a) which says
6 before taking any adverse action that Fred Meyer can delegate
7 the review of this information or the -- or any corrections or
8 clarifications regarding this information to GIS, but that
9 doesn't divest Fred Meyer of the ability to take any adverse
10 action.

11 I'm not sure if that really made much sense.

12 MR. MATTINGLY: Your Honor, to the -- sorry.

13 THE COURT: Go ahead.

14 MR. MATTINGLY: Well, I was going to say, Your Honor,
15 to the extent that GIS is hired to administer a process, to
16 administer the opportunity to otherwise respond, which is
17 authorized under the law. No final binding decisions are made
18 until that process has been completed.

19 And, in fact, if we look at the facts on the face of
20 the complaint, Mr. Walker received a pre-adverse action notice
21 in, as opposing counsel said, five days, five business days,
22 generally the recognized waiting period. Mr. Walker did not
23 avail himself of the opportunity. Even if he thinks he had a
24 legal right to discuss his accurate information with GIS -- or
25 with Fred Meyer, he didn't dispute within the reasonable time

1 frame. So there is no injury because he didn't dispute.

2 THE COURT: I understand that argument.

3 So in sum what you're saying is that Fred Meyer has
4 delegated this particular responsibility to GIS, but it hasn't
5 delegated its decisionmaking as to whether or not to ultimately
6 take an adverse action against the employee, so it's not then
7 violating the terms of the statute or the language of the
8 statute.

9 Is that somewhat accurate?

10 MR. MATTINGLY: That is absolutely correct,
11 Your Honor.

12 THE COURT: Okay. So I know it's the defendant's
13 motion. But let me ask if there's anything else, Mr. Mattingly,
14 you would like to say with respect to this issue.

15 MR. MATTINGLY: Your Honor, I think the -- our
16 arguments and the briefs and this discussion today speak for
17 themselves. So with that, thank you for the opportunity.

18 THE COURT: And then, Mr. Woodrow, Mr. Mattingly made
19 some arguments that I'd like to give you the opportunity to
20 respond if you would like.

21 Is there anything you would like to say in response to
22 what he has just argued?

23 MR. WOODROW: Yes. Thank you, Judge.

24 Steven Woodrow.

25 Fred Meyer seizes upon three words in the FTC guidance

1 where it instructs employers that the purpose of the pre-adverse
2 action notice requirement is to facilitate a discussion. Fred
3 Meyer seizes upon the three words "or otherwise respond."

4 Judge, read in context, those three words are not
5 supposed to be exclusive avenues of each other where an employer
6 can either discuss issues with the employee one on one or they
7 can refer to a third party. It's not supposed to be one or the
8 other. It's supposed to facilitate a discussion between the
9 applicant and employee with the employer, but does not limit the
10 applicant or employee from also trying to fix any inaccurate or
11 misleading information in the consumer report.

12 So we would ask the Court to not read or otherwise
13 respond in the way that Fred Meyer urges.

14 We also have the fact, Judge, that GIS disclaims any
15 involvement in the hiring decision process. So complaining to
16 GIS and lodging disputes with GIS or trying to explain accurate
17 but misleading information to GIS is -- I hesitate to use the
18 word "fool's errand," but it does seem a bit of makework on
19 behalf of applicants and employees. GIS has no ability,
20 according to its own notices, to make the hiring decision.

21 We also have no facts of record showing that Fred
22 Meyer only delegates the limited amount of responsibility to
23 GIS. What it seems happens is that Fred Meyer provides a list
24 of system criteria to GIS and then GIS produces notices based on
25 that system criteria and that there's actually very little, if

1 any, communication between GIS and Fred Meyer once those
2 criteria are met.

3 So if an application like Daniel Walker's comes back
4 with a flag on it, it's our belief that Fred Meyer has very
5 limited involvement after that point. It's basically instructed
6 GIS what to do when these types of flags are raised and
7 therefore we don't need to be involved in the process anymore.

8 So while Counsel might ultimately be correct and our
9 hunches might be wrong, Judge, we don't have any facts of record
10 to show that now. We need discovery on that issue.

11 It does look like Fred Meyer shoves this off onto GIS
12 and directs any disputes to GIS, but then, you know, in a game
13 of sort of cat and mouse, then when the decision comes down
14 says, oh, GIS had nothing to do with it.

15 So, Judge, we would urge the Court to look past that.

16 THE COURT: Can you clarify, Counsel, the language of
17 the statute as you know says before taking any adverse action
18 based in whole or in part on the report, the person intending to
19 take such adverse action shall provide to the consumer a copy of
20 the report.

21 Can you tell me where in the statute or how it is that
22 you arrive at the conclusion that this statute provides people
23 such as your client the right to discuss the adverse action with
24 the employer.

25 MR. WOODROW: Yes, Judge.

1 That's set forth most fully and completely in our
2 briefing. We cite -- I believe it's two or three FTC decisions
3 repeating over and over again that employers should get with
4 their lawyers and craft reasonable language in light of the
5 purpose of the statute and of the standalone notice requirement.

6 And they say that over and over again, that the
7 purpose of the requirement -- I'll quote it for you,
8 Your Honor -- it's in the *Lewis* advisory opinion and others.
9 "Employers may wish to consult with their counsel in order to
10 develop procedures that are appropriate keeping in mind the
11 purpose of the provisions to allow" --

12 THE COURT: Sorry, Counsel. When you're reading, be
13 sure to slow down.

14 MR. WOODROW: Certainly, Judge.

15 This is in advisory opinion to *Coffey*, and in advisory
16 opinion to *Lewis*, and what they say is, "Employers may wish to
17 consult with their counsel in order to develop procedures that
18 are appropriate keeping in mind the purpose of the provision is
19 to allow consumers to discuss the report with employers before
20 adverse action is taken."

21 And that's back from 1998, Your Honor, in June. So
22 we're coming up on its 20th anniversary.

23 And the reason I believe, Judge, that these issues
24 rarely come up is because most employers do a good job of
25 following the FTC guidance and don't force employees and

1 applicants to go to some third party that later disclaims any
2 responsibility in the hiring decision.

3 THE COURT: Okay. I think I understand.

4 Let me just finally go to Mr. Mattingly just to give
5 you an opportunity to address that last issue if you would like.

6 MR. MATTINGLY: Yes, Your Honor.

7 Again, I would point out that there are multiple FTC
8 opinions, there are opinions that say -- discussions such as the
9 one Mr. Woodrow just mentioned that state what he stated, what
10 he read.

11 As I've already stated, there are also other FTC
12 opinions that include a statement or otherwise respond clearly
13 since it's an "or," not an "and," it's not one or the other.

14 And I'm trying to -- let me look at my notes real
15 quick, Your Honor.

16 The only other thing that I want to bring up without
17 bringing up a whole other issue is, again, I would just point
18 out that the -- to the extent that these opinions have been out
19 there for 19 years, they are not authoritative. Some courts,
20 not the Ninth Circuit, have found them to be persuasive. The
21 Ninth Circuit in *Syed* did not find them to be persuasive even
22 when they were dealing with an issue where the FTC opinions were
23 relevant to the issue at hand. In that case it was a liability
24 waiver case, whether liability waiver was extraneous
25 information. There are FTC opinions directly on that issue and

1 the Ninth Circuit specifically declined to rely on those.

2 So to the extent that this entire case of Mr. Walker's
3 is built on FTC opinions, the statute doesn't contain any of
4 this, and so we're left with the Ninth Circuit saying that FTC
5 opinions are -- essentially they're going to decline to rely on
6 them.

7 So I would just point that out and -- with respect to
8 the value of the FTC opinions.

9 THE COURT: Okay. All right. So let me thank you all
10 for your helpful arguments today and also for the excellent
11 briefing. I'm going to take it under advisement as of today.
12 I'll take a closer look, of course, at your briefing and also
13 the cases that you've cited.

14 So with that, I think that we're going to conclude our
15 proceedings for today.

16 Thanks so much.

17
18 (The proceedings concluded at 10:12 a.m.)

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1 C E R T I F I C A T E
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I certify, by signing below, that the foregoing is a
true and correct transcript of the record, taken by stenographic
means, of the proceedings in the above-titled cause. A
transcript without an original signature, conformed signature,
or digitally signed signature is not certified.

8
9 DATED this 27th day of August, 2018.
10
11
12

13 RYAN WHITE
14 Registered Merit Reporter
15 Certified Realtime Reporter
16 Expires 9/30/2019
17 Washington CCR No. 3220
18 Expires 10/25/2018
19 Oregon CSR No. 10-0419
20 Expires 12/31/2020
21
22
23
24
25

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